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UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Civil No. 07-4762-PJH

Plaintiff,

v.

CHARLES CATHCART, SCOTT
 CATHCART, YURIJ DEBEVC, a/k/a YURI
 DEBEVC, ROBERT NAGY, DERIVUM
 CAPITAL (USA), INC., VERIDIA
 SOLUTIONS, OPTECH LIMITED,
 CHIHHSIU HSIN, a/k/a CHARLES HSIN,
 FRANKLIN THOMASON

Defendants.

**MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 DEFENDANTS HSIN AND
 OPTECH LIMITED'S
 ADMINISTRATIVE MOTION
 PURSUANT TO LOCAL RULE 7-11
 TO CONTINUE THE ENTIRE
 CASE MANAGEMENT SCHEDULE
 ORDER**

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STATEMENT OF FACTS

The above civil action was filed on September 17, 2007.

Very late in the proceedings this Court ordered the First Amended Complaint to be filed on April 18, 2008. The First Amended Complaint was filed on April 23, 2008. The Moving Defendants, Charles Hsin and Optech Limited ("Moving Defendants" or "Defendants"), were served the First Amended Complaint on May 13, 2008.

The Court had the following deadlines in effect prior to service of the First Amended Complaint on Defendants pursuant to its Civil Minute Order of January 3, 2008 (other than item 1):

1. The last day to amend pleadings is June 5, 2008.
2. The cut-off date for the designation of experts is August 20, 2008.
3. The cut-off date for non-expert discovery is September 3, 2008.
4. The cut-off date for expert discovery is October 1, 2008.
5. Dispositive motions must be heard by November 19, 2008.
6. Trial is set for March 23, 2009.

Again, the Moving Defendants were joined as parties by virtue of the filing of the amended complaint on April 23, 2008. After a reasonable extension of times approved by the Court, the Defendants have moved expeditiously by filing a series of meritorious, good faith non-dispositive motions. The Defendants have not been able to file dispositive motions on technical grounds due to the inability to obtain certain declarations to date.

The motions are set for hearing on September 10, 2008.

The Defendants are not required to file an answer until ten (10) days after the above motions are decided.

The deadline of June 5, 2008 cutting off the right to amend pleadings had already run before the Defendants had even filed the first motion on June 15, 2008. The second deadline on the designation of experts ran on August 20, 2008. Yet, the good faith motions have not

1 even been heard. The third discovery deadline cutting off non-expert discovery will have run
 2 before the Defendants are required to answer the complaint on September 3, 2008.

3 The Federal Rules of Civil Procedure shall herein be referred to as “FRCP.”

4 ARGUMENT

5 **I. THE MOVING DEFENDANTS HAVE SHOWN COMPELLING GROUNDS FOR** 6 **THE REQUESTED CONTINUANCE UNDER THE NINTH CIRCUIT’S FOUR** 7 **FACTOR TEST**

8 The standard of review that must be met for the grant of a continuance is an abuse of
 9 discretion. However, this standard is keyed to a four factor test in US v. Flynt, 756 F.2d 1352,
 10 1359 (9th Cir. 1985). The test is mainly for the benefit of the Court’s consideration because
 11 there are “no mechanical tests for deciding when a denial of a continuance warrants reversal.”
 12 Id. at 1362.

13 The four factors are:

- 14 A. the extent of appellant’s diligence in his efforts to ready his defense prior to the date set for
 15 hearing,
- 16 B. the likelihood that the need for a continuance could have been met if the continuance had
 17 been granted,
- 18 C. the extent to which granting the continuance would have inconvenienced the court and the
 19 opposing party, including its witnesses, and
- 20 D. the extent to which the appellant might have suffered harm. Id.

21 In Flynt, the District Court refused to grant a continuance of the trial to allow the
 22 defendant time to be examined by expert witnesses to assist in his defense. Id. at 1358. The
 23 Ninth Circuit indicated that the District Court denied the continuance mainly because Flynt was
 24 yelling obscenities at the judge and demanding that he be put in jail. Id. The District Court’s
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1 decision was reversed. The Ninth Circuit held that the denial of a continuance by the District
2 Court was an abuse of discretion because:

- 3 i. Flynt asserted sufficient diligence in trying to secure evidence because the need
4 for a continuance was mainly due to the fact that the three expert witnesses were
5 unable to perform adequate evaluations within the time constraints,
6 ii. the continuance is needed and would be for the useful purpose of finding and
7 using witnesses to assist in his defense on a legitimate issue of fact,
8 iii. there would be no cognizable inconvenience to the court or the government
9 given the fact that there would be no scheduling difficulties if the proceedings
10 were re-calendared, and
11 iv. Flynt suffered extreme prejudice as a result of the court's denial because by
12 denying the court the opportunity to hear testimony from the expert witnesses
13 Flynt would not be able to put forth the only defense that he had.
14

15 We now apply the four factors i-iv to the facts here.
16

17 **A. THE DEFENDANTS EXERCISED SUFFICIENT DUE DILIGENCE**

18 The Moving Defendants were joined as parties on April 18, 2008 and were served on
19 May 13, 2008.

20 After being served, the Defendants diligently exercised their due process rights under
21 the Federal Rules of Civil Procedure ("FRCP") by filing good faith non-dispositive motions,
22 including motions for more specific pleadings. These motions are currently under
23 consideration by this Court. However, by the time these motions are decided, the above crucial
24 deadlines will have already passed through no fault of the Moving Defendants. Despite any
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1 vigorous due diligence, the election of the U.S. to bring in the Defendants so late into the case
 2 defeats the more than sufficient due diligence the Defendants could have and did exercise.

3 **B. THE NEEDS OF THE DEFENDANTS WILL BE MET IF A CONTINUANCE IS**
 4 **GRANTED**

5 The Defendants believe that it is necessary for this Court to decide on the meritorious
 6 non-dispositive motions so the Defendants can answer the specific pleadings under the rules.
 7 The U.S. elected to file a vague, conclusory complaint which lumped the defendants together.
 8 The complaint is currently so vague that FRCP 9(b) and 12(e) motions were necessary.

9 After the proper disclosures are made by the Plaintiff, the Defendants will request
 10 documents and conduct interrogatories. Then, the Defendants will take depositions of
 11 government officials and third party witnesses,¹ conduct discovery and research, and select the
 12 needed experts after discovery. However, the Defendants are currently barred from exercising
 13 their rights under the FRCP.
 14

15 The Defendants plan to file dispositive motions that present new meritorious issues,
 16 including constitutional issues, issues relating to the Administrative Procedures Act, estoppel
 17 issues, and mootness issues, which the Defendants wish to pursue if the non-dispositive
 18 motions are denied. Currently, the Defendants have had difficulty in obtaining certain
 19 declarations. Defendants anticipate that these declarations will be obtained shortly. See
 20 Declaration of Edward O.C. Ord In Support of Defendant's Motion filed concurrently ("Ord
 21 Decl.") ¶5.
 22

23 In Nakamoto v. Hartley, 758 F.Supp. 1357, 1368 (D.Hawaii 1991), a continuance of
 24 trial was granted and the discovery cutoff date was extended by the District Court. The court
 25 indicated the defendant's motions presented "some new issues upon which defendants have not
 26

27 ¹ The Government has already taken depositions and other discovery in the past.

1 yet had adequate discovery.” Similarly, the motions by the Defendants in this case also raise
 2 new issues which can only be sufficiently prepared for by extending the discovery cutoff date
 3 to a reasonable time. See Ord Decl. ¶¶4, 6, and 7. By extending the discovery cut-off periods
 4 and granting a continuance of trial, the Defendants’ needs outlined above will be met for trial.

5 **C. A CONTINUANCE WOULD NOT INCONVENIENCE THE COURT OR THE**
 6 **OPPOSING PARTY**

7 At the present time the Court has personal jurisdiction over all defendants in this
 8 proceeding, except one. If a defendant acts inappropriately, the Court can use its inherent
 9 supervision powers to put a stop to such actions. The Plaintiff will thus not be inconvenienced
 10 whatsoever by granting this continuance.

11 Moreover, the government will not be inconvenienced because any inconvenience
 12 objection has been waived due to the fact that the government chose to add the Defendants at
 13 such a late date in the proceedings.²

15 The 90% Stock Loan transaction is actively being litigated by taxpayers in the Federal
 16 Courts. By granting a continuance, the Court will have the benefit of these decisions on the
 17 merits of the loan transaction. One state superior court has granted summary judgment holding
 18 all the loans in issue in this civil action were not the sales of securities but bona fide loans. See
 19 Ord Decl. ¶11. Thus, the continuance would put the Court in a much more informed position
 20 and would not inconvenience the Court as the Court is double and triple booked through 2009
 21 or any opposing party whatsoever as everyone is seeking more time, including the Plaintiff.
 22

24 ² The Government could have filed a separate civil action for an injunction against the Moving
 25 Defendants but chose not to. Also, the Government is still seeking to serve Franklin Thomason
 26 alleged to be a principal and director of Optech Limited. The Court granted the Government’s
 27 motion today and required that Thomason be served by publication no later than October 20,
 28 2008. By the time publication is obtained and if Thomason answers, it will be time for trial and
 all deadlines with respect to Thomason will have run.

D. DEFENDANTS WOULD SUFFER HARM AND PREJUDICE IF THE CONTINUANCE IS DENIED

Under the current deadlines, by the time the motions are decided the Defendants cannot amend any pleadings and could not conduct non-expert discovery at all before an answer is filed. The situation here is similar to but more egregious than in Sutherland Paper v. Grant Paper Box Co., 183 F.2d 926 (3rd Cir. 1950). In Sutherland, a patent infringement case, the Third Circuit held that the denial of a continuance constituted an abuse of discretion because the defendants were not given adequate time to prepare for discovery given the fact that the defendants' motions for summary judgment, discovery and production, and rulings on answers to interrogatories were not decided until two weeks before the trial date. Id. at 930.

Here, by the time the Defendants' motions are decided and answered, the above delineated deadlines will already have run. In Sutherland, the defendants had two weeks to analyze and interpret their discovery. Worse than Sutherland, the Moving Defendants in this case would not even have the opportunity for discovery after their motions are decided because the cut-off date for discovery will have already expired. Similar to the rationale given by the court in Sutherland, the Moving Defendants' motions are "neither baseless nor frivolous," the motion for a continuance is reasonable and necessary, and thus there is no reason for the "deprivation of reasonable opportunity to make adequate preparation for trial." Id. at 931. Even more egregious, no discovery has been received from the Government other than the initial disclosure and, today, a small part of the extensive discovery already produced to the other defendants – two of apparently eight digital discs containing documents. Indeed, Defendants understand from other parties in this case that the eight discs contain 363,159 separate files. Some of these files are multiple-page files, including one file consisting of 692

1 pages. Defendants have not yet have an opportunity to analyze these documents, and again, to
2 date, have only received two of the eight discs.

3 Furthermore, the Defendants should be entitled to at least the same amount of time to
4 perform discovery and trial preparation as the other defendants after evaluation of the massive
5 materials to be delivered in the future. The other defendants in this action had approximately
6 seven (7) extra months to react, conduct research, develop discovery, conduct interrogatories,
7 and attend the many depositions conducted by the Government. The Moving Defendants
8 should be allowed the same amount of time given to the other defendants to conduct discovery,
9 perform research, and adequately prepare for trial.

11 Under the current facts, deadlines, and procedure, harm is not only great, but fatal with
12 respect to defending the civil action.

13 **II. THE DUE PROCESS CLAUSE, INCLUDING AS IMPLEMENTED IN THE FRCP,**
14 **REQUIRES THE GRANT OF THE REQUESTED CONTINUANCE**

15 The Court is required to grant the requested continuance on an independent basis of a
16 showing of fundamental unfairness. The leading case is Nelson v. Adams USA, Inc., 529 U.S.
17 460 (2000). This case made important corner stone rulings that apply to any civil action.

18 The Supreme Court said:

- 19
- 20 ■ “The Federal Rules of Civil Procedure are designed to further the due process of law that
21 the Constitution guarantees” (Id. at 465.);
 - 22 ■ “all of the Federal Rules of Civil Procedure must be followed to get a judgment” (Id. at
23 470);
 - 24 ■ that all parties must be given all of their rights under the FRCP even if it can be shown that
25 the requesting party will not prevail (Id. at 471); and
- 26

1 ▪ that an appeal is not an adequate remedy for an opportunity to defend against the imposition
2 of liability (Id. at 466).

3 Nelson involved a patent infringement civil action. The civil action was dismissed in
4 favor of the defendant Adams USA, Inc. Id. at 463. The District Court granted an award of
5 attorney's fees in favor of the Adams USA, Inc. Id. The defendant, Adams USA, Inc., was
6 afraid that the plaintiff OCP Corporation might be unable to pay the attorney's fees. Id.
7 Consequently, the defendant, Adams USA, Inc., moved under FRCP Rule 15 to amend its
8 pleading to add Nelson as a party. Id. Nelson was OCP's president and sole-shareholder. Id.
9 Simultaneously, Adams moved, under Rule 59(e), to amend the fee award judgment to include
10 Nelson. Id.

12 The District Court granted both motions in full, i.e. simultaneously making Nelson a
13 party and subjecting Nelson to judgment as a co-debtor. Id.

14 The Court of Appeals affirmed.

15 The U.S. Supreme Court granted Nelson's appeal and reversed.

17 The Court held that amending the judgment to include Nelson at the same time the
18 District Court permitted the amendment of the pleading was fundamentally unfair. Due process
19 as implemented in the FRCP required that a defendant be given the "right to have *time* and
20 *opportunity* to respond to [a civil action]." Id. at 469. (Emphasis added).

21 Regarding the due process rights as implemented in the FRCP, the Court said that the
22 test is "fundamental unfairness." Id. at 470. The Court did not indicate that prejudice is
23 required to be shown. Id. Therefore, the standard of review is "fundamental unfairness."

24 In the instant case, the denial of a continuance would be fundamentally unfair. The
25 Moving Defendants do not have the same amount of time as the other defendants to make non-
26

1 dispositive and dispositive motions, conduct investigations, conduct discovery, and prepare for
2 trial as guaranteed by the FRCP. The other defendants have had seven (7) extra months to
3 exercise their rights under the FRCP. The government has taken years of investigation and
4 preparation, including using IRS administrative summons and other investigative tools.

5 Unfairness exists as well due to the fact that most of the major critical deadlines have or
6 are about to run while the Moving Defendants are still in the pleading stage. Two of the
7 imminent deadlines have run, including the ability to amend pleadings and designate experts.
8 Also, when the Defendants were joined as a party the government had already taken discovery.
9

10 Despite the efficient and diligent speed with which the Defendants are moving, a
11 continuance is necessary because of the imminence of the current deadlines. This current
12 situation is due to no fault of the Moving Defendants, but can only be attributed to the lateness
13 with which the government chose to join the Defendants as a party and the continued
14 enforcement of a schedule order treating the Moving Defendants as if they had been named and
15 served under the original complaint.
16

17 The courts in conducting their proceedings are required to conduct them so that the
18 courts are not infringing on the constitutional rights of the parties. The courts are also required
19 to conduct their proceedings in a manner to avoid these types of constitutional issues.

20 By granting the continuance, the court would also avoid the situation of whether a civil
21 injunction would deny the Defendants their constitutional right to a jury trial, which they are
22 entitled to with respect to any civil penalty imposition.
23

24 A stipulation has been signed by the parties that extends the deadlines as follows:

- 25 ■ The date to amend the pleading will be continued from June 5, 2008 to December 5,
26 2008.

- This stipulation was rejected by the Court.

The Moving Defendants would be unable to evaluate meaningfully the above documents and to conduct any necessary follow-up investigation and discovery under the

existing deadlines. The Moving Defendants are barred from taking affirmative discovery. The Moving Defendants wish to state their needs as clearly as possible.

Therefore, the Court should grant the extension of the deadlines by seven (7) months to give the Moving Defendants the same amount of time as the other parties, including future dispositive motions.

CONCLUSION

The Court, with all due respect, is required to continue the trial date and the related deadlines. It should give equal time to the Moving Defendants. Fundamental fairness as applied to the FRCP leaves the Court no other choice. Any denial also constitutes an abuse of discretion. The new requested deadlines are based on the seven (7) months and five (5) days of extra time that the other defendants had to prepare, and are as follows:

1. The last day to amend pleadings would be May 10, 2009.
2. The cut-off date for the designation of experts would be July 25, 2009.
3. The cut-off date for non-expert discovery would be August 8, 2009.
4. The cut-off date for expert discovery would be September 6, 2009.
5. Dispositive motions would be heard by October 24, 2009.
6. Trial would set for February 28, 2010.

Due to the Court's double and triple booking for trials for 2009, an early setting in 2010 will be more appropriate and convenient for the Court.

Dated: August 25, 2008

Respectfully Submitted,

ORD & NORMAN

By /s/ Edward O.C. Ord
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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

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